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Supreme Court, U.S.
FILED

No. 05-607 SEP 7 2005

IN THE OFFICE OF THE CLERK

SUPREME COURT OF THE UNITED STATES

JASON RHOADES; MICHAEL DOWNING; JOHN BORNSCHEIN, on behalf of themselves and all others similarly situated,

Petitioners,

Against

BARBARA QUEEN-JOHNSON, a member of the Parole Board, et. al.,

Defendants.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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SUPREME COURT, U.S.

QUESTIONS PRESENTED

1) Whether current Michigan statutes create a liberty interest in parole which vests in those prisoners who score high on the Michigan parole guidelines?

2) Whether Michigan parole board members engage in decision making which has the chacteristic attributes of a judicial proceeding which may entitle them to absolute quasi-judicial immunity?

PARTIES

The petitioners are Jason Rhoades,[1] a state prisoner who is currently on parole; Michael Downing, a state prisoner at Florence Crane Correctional Facility in Coldwater, Michigan; and John Bornschein[2] a state prisoner at Straits Correctional Facility in Kincheloe, Michigan.

The respondents are Barbara Queen-Johnson, James Bartholomew, Adrian Green, George Lellis, Margie McNutt, Al Slaughter, William Reed, and Stephen Marschke, who are past members of the Michigan Parole Board; John Rubitschun, Miguel Barrios, Charles Braddock, and Marianne Samper, who are current members of the Michigan Parole Board; William Martin, and William Overton, who are past directors of the Michigan Department of Corrections; and Patricia Caruso, who is the current Director of the Michigan Department of Corrections.

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1. As a condition of Mr. Rhoades parole, respondents have prohibited him from having any contact with the other petitioners and, therefore, he was prevented from signing this petition.

2. Mr. Bornschein was discharged from his sentence on October 22, 2005, and now resides in Traverse City, Michigan.

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DECISIONS BELOW

The decision of the United "States Court of Appeals for the Sixth Circuit is unreported and a copy is attached as Appendix A to this Petition (A.1). The Order of the United States District Court for the Western District of Michigan is not reported. A copy is attached as Appendix C to this Petition (C.1). The decisions of respondents are attached as Appendix D (D.1).

JURISDICTION

The judgment of the United States Court of Appeals for the Sixth Circuit was entered on February 3, 2005. An Order denying a petition for rehearing was entered on June 8, 2005, and a copy of that order is attached as Appendix B to this petition (B.1). Jurisdiction is conferred on the Supreme Court by 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves Amendment XIV to the United States Constitution, which provides:

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

> Section 5. The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article.

The Amendment is enforced by Title 42, Section 1983, of the United States Code:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage of any State, Territory, or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purpose of this section, any Act of Congress applicable exclusively tot he District of Columbia shall be considered to be a statute of the District of Columbia.

The Michigan statutes involved in this case include Michigan Compiled Law, Section 791.233e(1), which provides:

> Sec. 33e. (1) The department shall develop parole guidelines that are consistent with section 33(1)(a) and that shall govern the exercise of the parole board's discretion pursuant to sections 34 and 35 as to the release of prisoners on parole under this act. The purpose of the parole guidelines shall be to assist the parole board in making release decisions that enhance the public safety.

Michigan Compiled Law, section 791.233e(5), which provides:

> (5) The department shall promulgate rules pursuant to the administrative procedures act of 1969, Act No. 306 of the Public Acts of 1969, being sections 24.201 to 24.328 of the Michigan Compiled Laws, which shall prescribe the parole guidelines. The department shall submit the propose rules to the joint committee on administrative rules not later than April 1, 1994. Until the rules take effect, the director shall require that the parole guidelines be considered by the parole board in making release decisions. After the rules take effect, the director shall require that the parole board follow the parole guidelines.

And Michigan Compiled Laws, Section 791.233e(6), which provides:

> (6) The parole board may depart from the parole guidelines by denying parole to a prisoner who has a high probability of parole as determined under the parole guidelines or by granting parole to a prisoner who has a low probability of parole as determined under the parole guidelines. A departure under this section shall be for substantial and compelling reasons stated in writing. The parole board shall not use a prisoner's gender, race, ethnicity, alienage, national origin, or religion to depart from the recommended parole guidelines.

STATEMENT OF THE CASE

The petitioners are Michigan prisoners who scored high on the parole guidelines and were denied parole. Their complaint alleged that Michigan statutes enacted in 1992 vest those prisoners who score high on the parole guidelines with a liberty interest in parole. It further alleged that the "substantial and compelling reasons" stated by the parole board members in support of departure from the legislative mandate that they be paroled did not satisfy the criteria established for such departures by the Michigan Legislature. The complaint also alleged that the directors of the department of corrections failed to require the parole board to follow the parole guidelines contrary to the mandate of the Michigan legislature. Having exhausted their administrative remedies, and with no state-law avenue of appeal available, petitioners sued the five parole board members directly involved in denying them parole for monetary, declatory, and injunctive relief; and the other ten respondents for declatory and injunctive relief, under 42 U.S.C. 1983.

The district court dismissed the complaint upon screening -- without analyzing the provisions of MCL 791.233e -- for failure to state a claim upon which relief can be granted based on the theory that the Michigan statutes do not create a liberty interest in parole and that the respondents are entitled to absolute immunity. The court of appeals affirmed the order dismissing the complaint for the reasons stated by the district court.

BASIS FOR FEDERAL JURISDICTION

This case raises a question of interpretation of the Due Process Clause of the Fourteenth Amendment to the

United States Constitution. The district court had jurisdiction under the general federal question jurisdiction conferred by 28 U.S.C. 1331.

ARGUMENT IN SUPPORT OF GRANTING CERTIORARI

I. State Law Created Liberty Interests in Parole

A. Conflicts with Decisions of Other Courts

The holding of the courts below that Michigan prisoners who score high on the parole guidelines do not have a liberty interest in parole is directly contrary to the principle of law that state statute may create a liberty interest in parole as established by the Court in Greenholtz v Nebraska Penal Inmates, 442 U.S. 1, 11; 99 S.Ct. 2100, 2106 (1979). In addition, the Michigan Court of Appeals has repeatedly recognized that the parole board can deny parole to Michigan prisoners who score high on the parole guidelines only for substantial and compelling reasons stated in writing. In Re Parole of Johnson, 291 Mich App 595, 601; 556 NW2d 899 (1998); In Re Parole of Scholtz, 213 Mich App 104, 111; 585 NW2d 352 (1998); Killebrew v Dep't of Corrections, 237 Mich App 650, 654; 604 NW2d 646 (1999).

B. Importance of the Question Presented

This case presents a fundamental question of the interpretation of this Court's decision in Greenholtz v Nebraska Penal Inmates, 442 U.S. 1, 11; 99 S.Ct. 2100, 2106 (1979). The question presented in of great importance because it effects the operations of prisons in

all states which have parole statutes implemented by parole boards. In view of the large amount of litigation over parole proceedings, further guidance on the question is also of great importance to the judiciary. In addition, the question is of great importance to prisoners, because it effects their ability to receive both fair, and lawful, decisions in proceedings which may result in months or years of added confinement at a higher security level.

The issue's importance is enhanced by the fact that the lower courts in this case **have completely ignored the applicability of Greenholtz, and the provisions of MCL 791.233e**. This Court held in Greenholtz that a state statute creates a protected liberty interest in parole if it: 1) uses mandatory language to create an entitlement and, 2) collaterally imposes substantive predicates, which limits the parole board's discretion. The Court reiterated this point in Board of Pardon's v Allen, 482 U.S. 369; 107 S.Ct. 2415 (1987), and added that the semantically structure of the any such statute does not alter the result that "[a]ny such statute 'creates the presumption that parole release will be granted.' Greenholtz, supra, at 12, 99 S.Ct. at 2106." Board of Pardons, 482 U.S. at 378; 107 S.Ct. at 2421. The provision of MLC 791.233e satisfy the Greenholtz test in the case of Michigan prisoners who score high on the parole guidelines.

The common sense understanding of "departure" is that it is a deviation from the norm; or in this case a legislative mandate. Under Michigan law, the parole board may "depart" from the parole guidelines by denying parole to a high scoring prisoner only for substantial and compelling reasons. The Michigan Supreme Court has held that "substantial and compelling reasons" is a legal term of art and that when used in a statute:

> A "substantial and compelling reason" must be construed to mean an "objective and verifiable" reason that "'keenly' or 'irresistibly' grabs our attention"; is of 'considerable worth' in deciding the length of a sentence" and "exists only in exceptional circumstances." People v Babcock, 469 Mich 247, 257; 666 NW2d 231 (2003).

Clearly, such criteria places severe limitations on the parole board's authority to depart from the legislature's mandate that high scoring prisoners shall be granted parole.

The lower court's reasoning that prisoners who score high on the Michigan parole guidelines have no liberty interest in parole is unconvincing. It relied on a Sixth Circuit case which began in the 1970's and which interpreted Michigan's parole statutes **as they existed in the 1970's**. See Sweeton v Brown, 27 F.3d 1162 (6th Cir. 1994) (en banc). The Michigan legislature, however, has substantially reformed the state's parole laws since then; including the 1992 enactment of MCL 791.233e which is "intended to 'govern the exercise of the parole board's discretion ... as to the release of prisoners on parole ....' MCL 791.233e(1)" Johnson, 219 Mich App at 599. The Michigan parole guidelines became fully binding upon the parole board with the promulgation of Administrative Rule 791.7716 in 1996. See MCL 791.233e(5), supra, at p. 3.

By completely ignoring, much less analyzing, the provisions of MCL 791.233e for a state law created liberty interest in parole under the test established by this Court in Greenholtz, the lower courts have effectively usurped this Court's authority to determine the legal principles which are constitutionally binding on the States and have capriciously allowed the state of Michigan to

violate the civil rights of its citizens. The Court should correct this fundamental error and make it clear that state statutes, such as MCL 791.233e, do create a liberty interest in parole even though that liberty interest vests only in a specific subset of a state's prisoners.

II. Absolute Quasi-Judicial Immunity

A. Conflicts with Decisions of This Court

The holding of the courts below that respondents are entitled to absolute immunity is directly contrary to the holdings of this Court in Butz v Economou, 438 U.S. 478; 98 S.Ct. 2894 (1978).

B. Importance of the Question Presented

The question presented is of great public importance because it effects the operations of prisons in all states which have parole statutes implemented by executive branch appointees. In view o f the large amount of litigation over parole proceedings, further guidance on the question is also of great importance to the judiciary. In addition, the question is of great importance to prisoners, because it effects their ability to receive fair, and lawful parole decisions, as well as their ability to enforce their fundamental civil rights.

The issue's importance is enhanced by the fact that the lower courts in this case have completely ignored the applicability of Butz. In Butz, 438 U.S. at 512; 98 S.Ct. at 2913, this Court identified the following factors, among others, as characteristic of the judicial process and to be considered in determining absolute, as contrasted with qualified, immunity as it applies to executive branch

decision makers: (a) the need to assure that the individual can perform his function without harassment or intimidation; (b) the presence of safeguards that reduce the need for private damage actions as a means of controlling unconstitutional conduct; (c) insulation from political influence; (d) the adversary nature of the process; and (e) the correctability of error on appeal.

The current manner in which the Michigan parole board operates lacks practically all of the characteristics described above. Protection from harassment and intimidation is adequately addressed by qualified immunity. "For executive officials in general, however, our cases make plain that qualified immunity represents the norm." Harlow v Fitzgerald, 457 U.S. 800, 807-808; 102 S.Ct 2727, 2732-2733 (1982).

There are no safeguards which reduce the need for private damage actions as a means of controlling unconstitutional conduct. Michigan parole board decisions are not grievable. No hearing is conducted and no record is made of any parole board interview. Michigan law prohibits representation by an attorney or another prisoner; and staff members are prohibited from making any recommendation. MCL 791.235(6) and (8). There are no cognizable objective standards and the information relied upon is often hearsay, and inaccurate or incomplete. The board members are not truly independent, but, rather, are political appointees of the governor. MCL 791.231a. Cf. Cleavinger v Saxner, 474 U.S. 193, 206; 106 S.Ct. 496, 503 (1985). In Michigan, the parole board is hardly a "neutral and detached" hearing body as envisioned in Morrisey v Brewer, 408 U.S. 471, 489; 92 S.Ct. 2593, 2604 (1972). And though, in Michigan, the parole process is not supposed to be adversarial...in reality it often is...with the prisoner on one side and the executive

branch's political appointees, executing political policy, on the other.

Under Michigan law no appellate review of a parole board decision is available to prisoners other than via extraordinary writ in rare -- and as yet undefined -- circumstances. Morales v Parole Board, 260 Mich App 29, 40; 676 NW2d 221 (2003).

In reality, the characteristics of the operation of the Michigan parole board are diametrically opposed to the characteristics of the judicial process which have occasioned the grant of absolute quasi-judicial immunity. See Cleavinger, 474 U.S. at 206; 106 S.Ct. at 503.

The lower courts' reasoning that respondents are entitled to absolute immunity is unconvincing because it relied upon a case from the Second Circuit that does not support that conclusion, i.e., Scott v Almenas, 143 F.3d 105, 111 (2nd Cir. 1998) -- **and completely ignored the fact that only five of the respondents were sued for monetary damages**. The Scotto decision dealt with a parole field supervisor who was granted absolute **prosecutorial** immunity where he filed parole violation charges. And though it does cite cases from several circuits which apparently address parole boards in those circuits; it **does not** evaluate whether the Michigan parole board members engage in decision making which has the characteristic attributes of a judicial proceeding which may entitle them to absolute quasi-judicial immunity.

Parole boards differ wildly in structure and operation from state to state and, therefore, they do need to be evaluated on an individual basis via the "functional" test as set forth by this Court in Butz.

"Absolute immunity flows not from rank or title or 'location within the government,' Butz v Economou, 438 U.S., at 511; 98 S.Ct. at 2913, but from the nature of the responsibilities of the individual official.' Cleavinger, 474 U.S. at 201; 106 S.Ct. at 501, see also Forrester v White, 484 U.S. 219; 108 S.Ct. 538 (1988). Absent any actual evaluation of the manner in which the Michigan parole board operates the lower courts' decision also violates this principle of law by granting absolute immunity to the respondents based on nothing more than their rank or title.

As noted above, the Michigan courts have repeatedly given the respondents notice that they **do not** have unfettered discretion; yet they have continued to act as though they do. And, in such a case "it is not unfair to hold liable the official who knows or should know he is acting outside the law, and ... insisting on an awareness of clearly established constitutional limits will not unduly interfere with the exercise of official judgment." Butz, 438 U.S. at 506-507; 98 S.Ct. at 2911.

By completely failing to analyze how the Michigan parole board currently operates and completely ignoring the "functional" test for absolute immunity as established by this Court in Butz, the lower courts have effectively usurped this Court's authority to determine the legal principles which are constitutionally binding upon the States and have capriciously allowed the state of Michigan to violate the civil rights of its citizens with impunity. The Court should correct this fundamental injustice and make it clear that each state's parole board operations must be evaluated on an individual basis in order to determine whether or not its parole board members may be entitled to absolute as opposed to qualified immunity from monetary damages.

CONCLUSION

For the foregoing reasons, certiorari should be granted in this case.

Respectfully submitted,

Dated:_____

Jason Rhoades

Dated: 3-21-05 Michael Downing

Michael Downing

Dated : 3-15-05 John Bornschein

John Bornschein

No. 04-1172

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

JASON RHOADES, MICHAEL DOWNING, JOHN BORNSCHEIN, on behalf of themselves and all others similarly situated,	)	**FILED**
	)	FEB 3 2004
	)	LEONARD GREEN
	)	Clerk
Plaintiffs-Appellants	)	
v	)	ORDER
BARBARA QUEEN-JOHNSON, a member of the MI Parole Board, et, al.,	)	[redacted]
Defendants-Appellees.	)	

Before: NORRIS and GIBBONS, Circuit Judges; TODD, District Judge*

Jason Rhoades, Michael Downing, and John Bornschein, Michigan prisoners proceeding pro se, appeal the district court order that dismissed their complaint filed pursuant to 42 U.S.C. [Sec.] 1983. This case has been referred to a panel of the court pursuant to Rule 34(j)(1), Rules of the Sixth Circuit. Upon examination, this panel unanimously agrees that oral argument is not needed. Fed. R. App. P. 34(a)

*The Honorable James D. Todd, United States Chief District Judge for the Western District of Tennessee, by designation

Seeking monetary, dilatory, and injunctive relief, the plaintiffs sued current and former members of the Michigan Parole Board (Parole Board) and current and former directors of the Michigan Department of Corrections. The prisoners alleged that the defendants violated their Fourteenth Amendment rights to due process and state law when they denied them parole. The plaintiffs also sought to certify the case as a class action. The district court denied class certification and dismissed the complaint, holding that members of the Parole Board were immune from suit and that the complaint failed to state a claim, and dismissed the complaint, holding that members of the Parole Board were immune from suit and that the complaint failed to state a claim,. *See* 28 U.S.C. [Sec.] 1915A(b).

On appeal, the prisoners argue that: (1) prisoners who score high on the parole guidelines have a constitutionally protected liberty interest in parole; (2) the defendants are not entitled to immunity from monetary damages; and (3) the denial of class action certification was premature.

Upon de novo review, we affirm the district court's decision for the reasons stated by the district court. *See McGore v Wrigglesworth*, 114 F.3d 601, 601 (6ht Cir 1997). State parole board members are absolutely immune from suit for monetary damages for actions taken with respect to their decision to grant or deny parole. *See Hawkins v. Morse*, N. 98-2062, and 1999 WL 1023780 (6ht Cir. Nov. 4, 1999) (unpublished); *Scotto v. Almenas*, 143 F.3d 105, 111 (2nd Cir. 1998). Here, the prisoners alleged that members of the Parole Board denied them parole in spite of their high scores on parole guidelines. Because the plaintiffs sued the members of the Parole Board for monetary relief based upon their conduct in denying them parole, the defendants are entitled to absolute immunity from suit.

The district court also properly held that the plaintiffs' complaint failed to state a claim. Michigan's parole scheme does not create a protected liberty interest in parole because the Parole Board has broad discretion to recommend or deny parole. *See* Mich. Comp. Laws Ann. [Sec.] 791.235; *Sweeton v. Brown*, 27 F.3d 1162, 1164-65 (6th Cir. 1994) (en banc); *Hopkins v. Mich Parole Bd.*, 604 N.W. 2d 686, 689-91 (Mich. Ct. App. 1999). thus, the plaintiffs had no liberty interest in being paroled, and no due process claim.

Finally, the district court did not abuse its discretion when the court declined to certify a class action. *See Stout v. J.D. Byrider*, 228 F.3d 709, 716 (6th Cir. 2000). One of the prerequisites for class certification is that the representative must be able to protect fairly and adequately the interests of the class. *Id.* at 717. In this case, no representative party was available because pro se prisoners are not able to represent the class. *See Fymbo v. State Farm Fire & Cas. Co.*, 213 F.3d 1320, 1321 (10th Cir. 2000); *Oxendine v. Williams*, 509 F.2d 1405, 1407 (4th Cir. 1975).

Having found no basis for federal jurisdiction, the district court properly denied to exercise jurisdiction over the prisoners' supplemental state law claims. *See* 28 U.S.C. [Sec.] 1367(c)(3), *United Mine Workers v. Gibbs*, 383 U.S. 715, 726 (1966).

For the foregoing reasons, we affirm the district court's judgment. Rule 34(j)(2)(C), Rules of the Sixth Circuit.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green
Clerk

APPENDIX -- B.1

No. 04-1172

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT FILED

JUN 08 2005

LEONARD GREEN
Clerk

JASON RHOADES, ET AL.,

Plaintiffs-Appellants,

v.

BARBARA QUEEN-JOHNSON
A MEMBER OF THE MI
PAROLE BOARD, ET AL.,

Defendants-Appellees.

ORDER

BEFORE: NORRIS and GIBBONS, Circuit Judges; and TODD,* District Judge.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

/S/ LEØNARD GREEN
Leonard Green, Clerk

---

*Hon. James D. Todd, Chief United States District Judge for the Western District of Tennessee, sitting by designation.

APPENDIX -- C.1

UNITED STATES OF AMERICA
UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

JASON RHOADES, MICHAEL DOWNING and JOHN BORNSCHEIN,	)	
Plaintiffs,	)	Case No. 5:03-cv-180
v.	)	Hon Richard Alan Ensley
BARBARA QUEEN-JOHNSON, *et al.*, Defendants.	)	

JUDGEMENT

In accordance with the Opinion filed this date:

IT IS ORDERED that class certification is **DENIED.**

IT IS FURTER ORDERED that Plaintiffs' federal law claims are **DISMMISSED WITH PREJUDICE.**

IT IS FURTHER ORDERED that certification of a good-faith appeal pursuant to 28 U.S.C. [Sec.] 1915(a)(3) is **DENIED.**

This dismissal is described by 28 U S.C. [Sec.] 1915(g).

/s/ Richard Alan Enslen
RICHARD ALAN ENSLEN
UNITED STATES
DISTRICT JUDGE

DATED in Kalamazoo, MI:
December 15, 2003

CERTIFIED
ECF DOCUMENT

I hereby attest and certify that this is a printed copy of a document which was electronically filed with the United States District Court for the Western District of Michigan in 12-15-03

RONALD C. WESTON, SR., CLERK OF COURT

By: /s/ M Jewell Dated: 12-15-03

APPENDIX -- C.1

UNITED STATES OF AMERICA
UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

JASON RHOADES, MICHAEL DOWNING and JOHN BORNSCHEIN,	)	
Plaintiffs,	)	Case No. 5:03-cv-180
v.	)	Hon Richard Alan Enslen
BARBARA QUEEN-JOHNSON, *et al.*, Defendants.	)	

OPINION

This is a civil action brought by state prisoners pursuant to 42 U.S.C. [Sec.] 1983. Under the Prison Litigation Reform Act, Pub. Law. No. 104134, 110 Stat. 1321 (¡ª6) ·"PLRA"), the Court is required to dismiss any prisoner action brought under federal law if the complaint is frivolous, malicious, fails to state a claim upon which relief can be granted, or seek monetary relief from a defendant immune from such relief. 28 U.S.C. [Sec.] 1915A. The court must read plaintiff's *pro se* complaint indulgently, *see Haines v Kerner*, 404 U.S. 519, 520 (1972), accepts plaintiff's allegations as true, unlthey are clearly irrational or wholly incredible. *Denton v. Hernandez*, 504 U.S. 25, 33 (1992). Applying these standards, the Court will dismiss Plaintiff's Complaint

because the members of the Michigan Parole Board are immune and Plaintiff's to state a claim.

Discussion

I. Factual allegations

Plaintiffs bring this action on behalf of themselves and all other similarly situated Michigan state prisoners. The Complaint does not concern the conditions of Plaintiffs' confinement; rather, their action concerns the denial of their parole by the Michigan Parole Board. Plaintiffs sue twelve current and past members of the Michigan Paola Board. In addition, Plaintiffs sue Patricia Caruso, the Director of the Michigan Department of Corrections, as well as two of her predecessors, William Martin and William Overton.

Each of the Plaintiffs scored as having a high probability of parole under the Michigan parole guidelines, but was denied parole by the Michigan Parole Board. Under Michigan law, the parole board may depart from the parole guidelines as follows:

> The parole board may depart from the parole guidelines by denying parole to a prisoner who has a high probability of parole as determined under the parole guidelines or by granting parole to a prisoner who has a low probability of parole as determined under the parole guidelines. A departure under this subsection shall be for substantial and compelling reasons stated in writing. The parole board shall not use a prisoner's gender, race, ethnicity, alienage, national origin, or religion to depart from the recommended parole guidelines.

Mich. Comp. Laws [Sec.] 791.233e(6). Plaintiffs contend that the above statutory language creates a protected liberty interest in parole for prisoners who score under the guidelines as having a high probability of parole. They

further contend that the alleged "substantial and compelling" reasons given by the parole board for denying their parole do not meet the standard established by the Michigan Legislature. According to Plaintiffs, the Defendant parole board members have a custom or practice o denying parole to prisoners who score high under the parole guidelines for reasons which are not objective and verifiable. Plaintiffs further claim that the Defendants Caruso, Overton and Martin to require the members of the parole board to follow the parole guidelines contrary to the mandate of Mich Comp Laws [Sec.] 791.233e(5)[1]

Plaintiffs seek declatory and inju8nctive relief, as well as compensatory and punitive damages.

II. Request for Class Certification

Plaintiffs purport to bring their action "on behalf of themselves and all others similarly situated," which the Court construes as a request for class certification. For a case to proceed as a class action, the Court must be satisfied on a number of grounds, including the adequacy of class representation, *See* Fed. R. Civ. P. 23(a)(4). The Fourth Circuit has held that incarcerated, *pro se* litigants are inappropriate representatives of the interest of others. *See Oxendine v. Williams*, 509 F.2d 1405 (4th Cir. 1975); *see also Sule v Story*, No. 95-1422, 1996 WL 170156, at * 1 (10th Cir. 1996) (unpublished) (collecting cases). In numerous unpublished decisions, the Sixth Circuit has followed the Fourth Circuit's decision in *Oxendine*. *See Howards v. Dougan*, No. 99-2232, 2000 WL 876770, at * 1 (6th Cir. June 23, 2000), *cert. denied*, 532 U.S. 948 (2001); *Balard v. Campbell*, Nø. 98-6156, 1999 WL 777435, at * 1 (6th Cir. Sept. 21, 1999), *Giorgio v Tenn.*, Nø. [a]∞–6327, 1996 WL 447656, at * 1 (6th Cir. Aug. 7, 1996); *Marr v. Mich.*, No. 95-1794, 1996 WL 205582, at * 1 (6th Cir. April 25, 1996); *Barnes v. Dunn.*, No. 91-5889, 1991 WL 24553, at * 1 (6th Cir. Nov. 21, 1991) As Plaintiffs are incarcerated *pro se* litigants, the Court finds

that they are not appropriate representatives of a class. Therefore, the Court will deny Plaintiff's' request for class certification.

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[1]Under Mich. Comp. Laws [Sec.] 791.233e(5), the, "director shall require the parole board to follow the parole guidelines."

III. Immunity

The majority of the Defendants named in this civil rights action are members of the Michigan Parole Board. Members of a parole board have absolute immunity from damages for actions taken in the performance of their duties regarding the decision to grant or deny parole because that task is functionally comparable to that of a judge. *Hawkins v. Morse*, No. 98-2062, 1999 WL 1023780, at * 1 (6ht Cir. Nov. 4, 1999); *Tillman v. Price*, No. 96-2032, 1997 WL 225993, at * 1 (6th Cir. May 5, 1997); *Ward v. Moss*, No. 94-1417, 1994 WL 664948, at * 1 (6th Cir. Nov. 23, 1994); *accord Scotto v Almenas*, 143 F.3d 105, 110 (2nd Cir. 1998); *Wilson v. Kelkhoff*, 86 F.3d 1438, 1444 (7th Cir. 1996); *Anton v. Getty*, 78 F.3d 393, 396 (8th Cir. 1996); *Little v Bd. of Pardons & Parole Div.*, 68 F.3d 122, 123 (5th Cir. 1995) (per curium); *Russ v. Uppah*, 972 F.2d 300, 303 (10th Cir. 1992). The actions for which Plaintiffs complain were taken by Defendant Parole Board members in their quasi-judicial function of deciding whether to grant or deny Plaintiffs' parole; therefore, the parole board members are entitled to absolute immunity.

IV. Failure to state a claim

A complaint fails to state a claim upon which relief can be granted when it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations of the complaint. *Jones v. City of Carlisle*, 3 F.3d 945, 947 (6th Cir. 1993). To state a claim under 42 U.S.C. [Sec.] 1983, a plaintiff must allege the violation of a right secured by the federal Constitution or laws and must show that the deprivation was committed by a person acting under color of state law. *West v. Atkins*, 487 U.S. 42, 48 (1988); *Street v. Corrs. Corp. of Am.*, 102 F.3d 810, 814 (6th Cir. 1996). Because [Sec.] 1983 is a method for vindicating federal rights, not a source of substantive rights itself, the first

step in an action under [Sec.] 1983 is to identify the specific constitutional right allegedly infringed. *Albright v. Oliver*, 510 U.S. 266, 271 (1994).

A. **Due Process**

Plaintiffs maintain that their due process rights were violated when the parole board departed from the parole guidelines without providing adequate substantial and compelling reasons as required under state law. There is no constitutional right to be conditionally released before the expiration of a prison sentence. *Greenport v. Inmates of Neb. Penal & Corr. Complex*, 442 U.S. 1, 7 (1979). Although a state may establish a parole system, it has no duty to do so and thus, the presence of a parole system by itself does not give rise to a constitutionally protected liberty interest in parole release. *Id.* at 7; *Bd. of Pardons v. Allen*, 482 U.S. 369, 373 (1987). Rather, a liberty interest is present only if state law entitles an inmate to release on parole. *Inmates of Orient Corr. Inst. v. Ohio State Adult Parole Auth.*, 929 F.2d 233, 235 (6th Cir. 1991).

In *Sweeton v. Brown*, 27 F.3d 1162, 1164-65 (6th Cir. 1994) (en banc), the Sixth Circuit, noting "the broad powers of the Michigan procedural authorities to deny parole," has held that the Michigan system does not create a liberty interest in parole. Subsequent to its 1995 decision, the Sixth Circuit has recognized the continuing validity of *Sweeton* and has continued to find that Michigan's Parole scheme creates no liberty interest in being released on parole. *See Coleman v. Martin*, No. 02-2119, 2003 WL 1795710, at * 2 (6th Cir. Mar. 27, 2003) ("the state of Michigan has not created a liberty interest in parole eligibility"); *Bullock v. McGuinnis*, No. 00-1591, 2001 WL 180978, at * 2 (6th Cir. Feb 14, 2001); *Turnboe v. Stegall*, No. 00-1182, 2000 WL 1679478, at * 1 (6th Cir. Nov. 1, 2000) , *cert. denied*, 532 U.S. 978 (2001), *Hawkins v. Abramajtsy*, No. 99-1995, 2000 WL 1434695, at * 2 (6th Cir. Sept. 19, 2000); *Irvin v. Mich.*

Parole Bd., No. 99-1817, 2000 WL 800029, at * 2 (6th Cir. June 14, 2000), *cert. denied*, 531 U.S. 1197 (2001); *Clifton v. Gach*, No. 98-2239, 1999 WL 1253069, at * 1 (6th Cir. Dec. 17, 1999).

Furthermore, the Sixth Circuit has repeatedly held in unpublished opinions that particular parts of Michigan's statutory parole scheme do not create a liberty interest in parole. *See Fifer v. Mich. Dep't of Corrs.*, No. 96-2322, 1997 WL 681518, at * 1 (6th Cir. Oct 30, 1997); *Moran v. McGuinnis*, No. 95-1330, 1996 WL 303, at * 2 (6th Cir. June 5, 1996); *Vertin v. Gabry*, No. 94-2267, 1995 WL 613692, at * 1 (6th Cir. Oct. 18, 1995); *Leafhart v. Gach*, No. 95-1639, 1995 WL 734480, at * 2 (6th Cir. Dec. 11, 1995); *Neff v. Johnson*, No. 92-1818, 1993 WL 11880, at * 1 (6th Cir. May 9, 1991); *Janiskee v. Mich. Dep't of Corrs.*, No. 91-1103, 1991 WL 76181, at * 1 (6th Cir. May 9, 1991); *Haynes v. Hudson*, No. 89-2006, 1990 WL 41025, at * 1 (6th Cir. April 10, 1990). Finally, the Michigan Supreme Court has recognized that there is no liberty interest in parole under the Michigan system. *Glover v. Mich. Parole Bd.*, 596 N.W,2d 598, 603-604 (Mich. 1999). In light of these decisions, this Court cannot find that Mich. Comp. Laws [Sec.] 791.233e(6) creates a liberty interest in parole. Because Plaintiffs have no liberty interest at stake, they fail to state a claim for a violation of their procedural due process rights.

B. State law claims

plaintiffs also assert violations of state law. Section 1983 dos not provide redress for a violation of state law. *Pyles v. Raisor*, 60 F.3d 1211, 1215 (6th Cir 1995); *Sweeton*, 27 F.3d at 1166. To the extent that Plaintiffs' Complaint p[resents allegations under state law, this Court declines to exercise jurisdiction upon the dismissal of the federal law claims. *See* 28 U.S.C. [Sec.] 1367(c)(3). The Sixth Circuit has stated that district courts should generally decline to exercise supplemental jurisdiction over state law claims under these

circumstances. *See Landefeld v. Marion General Hosp.*, 994 F.2d 1178, 1182 (6ht Cir. 1993); *Hawley v. Burke*, No. 97-1853, 1998 WL 38577, at * 1-2 (6th Cir. June 18, 1998). Therefore, Plaintiffs' state law claims will be dismissed without prejudice.

Conclusion

Having conducted the review now required by the Prison Litigation Reform Act, the Court determines that Plaintiffs' action will be dismissed pursuant to 28 U.S.C. [Sec.] 1915A(b) because the members of the Michigan Parole Board are immune and Plaintiffs fail to state a claim.

The Court must next decide whether an appeal of this action would be in good faith within the meaning of 28 U.S.C. [Sec.] 1915(a)(3). *See McGore v. Wrigglesworth*, 114 F.3d 601, 611 (6th Cir. 1997). For the same reasons that the Court dismisses the action, the Court discerns no good-faith basis for an appeal. Should Plaintiffs appeal this decision, the Court will assess the $255 appellate filing fee pursuant to [Sec.] 1915(b)(1), *see McGore*, 114 F.3d at 610011, unless Plaintiffs are barred from proceeding *in forma pauperis*, e.g., by the "three-strikes" rule of [Sec.] 1915(g). If they are barred, they will be required to pay the $255 appellate filing fee in one lump sum.

This is a dismissal as described by 28 U.S.C. [Sec.] 1915(g).

A Judgment consistent with this Opinion will be entered.

/s/ Richard Alan Enslen

DATED in Kalamazoo, MI:
December 15, 2003

RICHARD ALAN ENSLEN
UNITED STATES
DISTRICT JUDGE

TRUE COPY
Signed Original Filed

Electronically
Ronald C. Weston, Sr., Clerk

Michigan Department of Correction Parole Board Decision

CFJ-279

Name:	Number:	Location:
RHOADES JASON BRADLEY	A324597	ACF

MAILED:
05/17/2002

The Michigan Parole Board, having attained jurisdiction over the sentence of the above prisoner, having considered the facts and circumstances including the prisoner's mental and social attitude, and having exercised the discretion granted by the legislature, says as follows:

X The Parole Board lacks reasonable assurance that the prisoner will not become a menace to society or to the public safety and denial of parole is warranted with action as follows:

DECISION DATE:	ACTION:	TERM OF DENIAL
05/13/2002	Continue.....	24 Months

RECONSIDERATION DATE:
04/17/2004
29

Regarding 30-day notice:
Inmate agreed with receiving 30 days notice

SUBSTANTIAL AND COMPELLING REASONS FOR GUIDELINE DEPARTURE:
Despite having benefit of therapy, P doesn't demonstrate the he has gained insight into his deviant behavior

REASONS IN SUPPORT OF PAROLE BOARD ACTION:

Crime & Criminal Behavior

The assaultive crime:

Current offense(s) is CSC crime.

The sexually motivated crime:

Violated a position of trust or authority
Involved a family member or acquaintance
Shows an established pattern of behavior
Had multiple victims
Involved minor/child victim

Name:	**Number:**	**Location:**
RHOADES JASON BRADLEY	A324597	ACF

MAILED:
05/17/2002

Correctional Adjustment

The behavior reflected in the misconducts:

Shows that prisoner has received misconduct(s) since coming to MDOC or since last PBI.

Personal History

The prisoner has a history of substance abuse which:

Is of long standing duration

Summary:

RECOMMENDATIONS FOR CORRECTIVE ACTION WHICH MAY FACILITATE RELEASE:

Demonstrate responsible behavior by earning positive work reports

Demonstrate responsible behavior by earning positive reports in any programs you may be involved in

Demonstrate leadership qualities by participation in department sanctioned activities

Enter into or continually involve yourself in substance abuse programming

Provide additional demonstration of positive prison behavior during the period of the continuance

COMPLETION DOES NOT GUARANTTEE A POSITIVE ACTION

/s/ Marianne Samper 5/3/2002 /s/ Willaim Reed 5/13/2002

∫Appendix -- D.3

Michigan Department of Correction Parole Board
Decision Page 1 of 2
CFJ-279

Name:	**Number:**	**Location:**
DOWNING MICHAEL	A236609	ACF

MAILED:
03/28/2002

The Michigan Parole Board, having attained jurisdiction over the sentence of the above prisoner, having considered the facts and circumstances including the prisoner's mental and social attitude, and having exercised the discretion granted by the legislature, says as follows:

X The Parole Board lacks reasonable assurance that the prisoner will not become a menace to society or to the public safety and denial of parole is warranted with action as follows:

DECISION DATE:	**ACTION:**	**TERM OF DENIAL**
03/22/2002	Continue.....	12 Months

RECONSIDERATION DATE:
06/01/2003
29

Regarding 30-day notice:
Inmate agreed with receiving 30 days notice

SUBSTANTIAL AND COMPELLING REASONS FOR GUIDELINE DEPARTURE:
Prisoner's continuing mimization of his deviant sexual behavior against his 12 yr old stepdaughter is an indication that prisoner has not developed any insight into his behavior. Thus deviation is warranted.

REASONS IN SUPPORT OF PAROLE BOARD ACTION:

Crime & Criminal Behavior

The assaultive crime:
Current offense(s) is CSC crime.

The sexually motivated crime:
Involved a family member or acquaintance
Shows an established pattern of behavior
Violated a position of trust or authority
Involved minor/child victim

Personal History

The prisoner has a history of substance abuse which:
Is of long standing duration

Michigan Department of Correction Parole Board Decision

Name:	Number:	Location:
DOWNING MICHAEL	A236609	ACF

MAILED:
03/28/2002

Personal History

The prisoner has a history of substance abuse which:

Is of a polysubstance nature

RECOMMENDATIONS FOR CORRECTIVE ACTION WHICH MAY FACILITATE RELEASE:

Demonstrate responsible behavior by earning positive reports in any programs you may be involved in

Identify and develop community resources to address special needs identified through group therapy

COMPLETION DOES NOT GUARANTTEE A POSITIVE ACTION

/s/ Margie McNutt 3/18/02 /s/ Miguel Barrios 3/22/02

Michigan Department of Correction Parole Board
Decision Page 1 of 2
CFJ-279

Name:	**Number:**	**Location:**
BORNSHEIN JOSEPH JOHN	B169192	ACF

MAILED:
06/14/2002

The Michigan Parole Board, having attained jurisdiction over the sentence of the above prisoner, having considered the facts and circumstances including the prisoner's mental and social attitude, and having exercised the discretion granted by the legislature, says as follows:

X The Parole Board lacks reasonable assurance that the prisoner will not become a menace to society or to the public safety and denial of parole is warranted with action as follows:

DECISION DATE:	**ACTION:**	**TERM OF DENIAL**
06/10/2002	Continue.....	12 Months

RECONSIDERATION DATE:
07/23/2003
29

Regarding 30-day notice:
Inmate agreed with receiving 30 days notice

SUBSTANTIAL AND COMPELLING REASONS FOR GUIDELINE DEPARTURE:
Inmate is now serving on his second CSC related crime which was both perpetrated against young boys. Considering the deviancy of the crime and the ingrained pattern of his behavior, there is no assurance that he will not become a menace to society.

REASONS IN SUPPORT OF PAROLE BOARD ACTION:

The assaultive risk level is very high or high which is indicative of a high probability of committing a new violent offense on parole.

Crime & Criminal Behavior

The assaultive crime:
Current offense(s) is CSC crime.

The sexually motivated crime:
Demonstrates pedophilic tendencies
Involved a family member or acquaintance
Involved minor/child victim
Shows an established pattern of behavior
Violated a position of trust or authority

The prisoner has a criminal history:
Of past sexual crime(s)
Which shows potential for committing further assaultive crimes

Michigan Department of Correction Parole Board Decision

Name:	Number:	Location:
BORNSHEIN JOSEPH JOHN	B169192	ACF

MAILED:
06/14/2002

Crime & Criminal Behavior

The prisoner has a criminal history:
Involving similar behavior to current offense
Of traffic related misdemeanors

Personal History

The prisoner has a history of substance abuse which:
Is of long standing duration

The prisoner's social history indicates:
Unstable social or family history

The placement plan submitted by the offender in the PER:
Lacks acceptable placement.

RECOMMENDATIONS FOR CORRECTIVE ACTION WHICH MAY FACILITATE RELEASE:

Demonstrate responsible behavior by earning positive reports in any programs you may be involved in

Demonstrate leadership qualities by participation in department sanctioned activities

Identify and develop community resources to address special needs identified through group therapy

COMPLETION DOES NOT GUARANTTEE A POSITIVE ACTION

/s/ William Slaughter 6/3/2002 /s/ William Reed 6/10/2002